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NUMBER

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991

UNITED STATES OF AMERICA.
Plaintiff/Respondent

vs.

LESLIE GRABLE AND MARSHA K. BLANCHARD,
Defendants/Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Sixth Circuit err in sanctioning the failure of the United States District Court for the Western District of Michigan to exercise its discretion and failing to rule on a Motion for Further Discovery before granting a Motion for Summary Judgement?

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SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

No.

vs.

LESLIE GRABLE and
MARSHA K. BLANCHARD
Defendants/Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE SURPREME COURT OF THE UNITED STATES:

Petitioners, Leslie Grable and Marsha K. Blanchard, present this, their petition for a writ of certiorari and state:

I PARTIES TO THE PROCEEDING

All parties to this action are listed in caption. There are no parent of affiliated companies, nor any corporation or other entity that has a financial interest in the outcome.

II REPORTS OF OPINIONS

1. Opinion from the United States District Court for the Western District of Michigan granting summary judgment in part and denying in part dated June 30, 1989.

2. Opinion from the United States Court of Appeals for the Sixth Circuit affirming the district court's final judgment dated October 8, 1991. (Unpublished)

3. Order from the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing dated December 9, 1991.

III GROUNDS FOR JURISDICTION

This Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit is filed pursuant to Rule 13 of the Rules of the Supreme Court of the United States.

A final judgment was entered by the United States District Court for the Western District of Michigan on June 30, 1989.

This Judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on October 8, 1991.

A petition for rehearing was denied by the United States Court of Appelas for the Sixth Circuit on December 9, 1991.

Petitioners believe that 28 U.S.C. Section 1254 (c) confers jurisdiction to review the Judgment in question by a writ of certiorari.

IV STATUTES AND REGULATIONS INVOLVED

The following statute is involved:

"The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish to the taxpayer a copy of the record of assessment." 26 U.S.C. Section 6203

The following Treasury Regulation is involved:

"The District Director and the Director of the Regional Service Center shall appoint one or more assessment officers. The District Director shall also appoint assessment

officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in case of tax shown on a return by a taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed." Treas. Reg. Section 301.6203-1 (1988)

V Statement Of The Case

The United States of America, Respondents herein, filed an action against Leslie Grable and Marsha K. Blanchard, Petitioners herein, seeking to reduce to judgement certain outstanding income tax assessments against Leslie Grable and Marsha Blanchard.

Defendants/Petitioners filed an answer in part denying that "— the assessments were properly made — ". (p A-3)

An Amended Complaint was filed on February 15, 1989 to correct the amounts claimed by the Plaintiff/Respondent. On February 22, 1989 the Plaintiff/Respondent filed a Motion for Summary Judgment (p A-1). On April 3, 1989 the Answer to the Amended Complaint was filed. On June 16, 1989 Defendants/Petitioners filed a Motion to Reopen Discovery. (p A-7) On July 5, 1989 the District Court entered an Opinion granting the Motion for Summary

Judgment (p A-11) and on September 12, 1989 entered an Order Denying the Motion to Reopen Discovery. (p A-23)

The resulting Judgment was appealed to the United States Court of Appeals for the Sixth Circuit and the Judgment was affirmed on October 8, 1991. A Petition for Rehearing was denied on December 9, 1991.

VI ORIGINAL JURISDICTION

The United States District Court for the Western District of Michigan had jurisdiction over this case under Sections 1340 and 1345 of Title 28 of the United States Code and Section 7402 of Title 26 of the United States Code.

VII ARGUMENT

The Defendants/Petitioners in this case claimed in the Answer that the Plaintiff/Respondent had not followed the proper procedure for making an assessment.

Thereafter, Defendants/Petitioners filed Interrogatories directed to obtaining information as to the procedure followed in making the assessments and as to the authority of the persons who performed such functions.

Plaintiff/Respondent filed a Motion for Summary Judgment and, then, filed Objections to all of the Interrogatories claiming that they were untimely.

Defendants/Petitioners filed a Memorandum in opposition to the Motion for Summary Judgment and requested, in the Memorandum, that the Court delay the ruling on the Motion for Summary Judgment to allow Defendants/Petitioners an opportunity to file a Rule 56 (f) Motion to Reopen Discovery.

The District Court granted the Motion for Summary Judgment without reference to the Defendants/Petitioners' Motion to Reopen Discovery and without hearing.

After the Judgment was entered the District Court

denied Defenants/Petitioners' Motion to Reopen Discovery as the Plainiff/Respondent's Motion for Summary Judgment has already been granted.

As the District Court stated in its opinion:

"Summary Judgment is appropriate only where no genuine issue of fact remains to be decided so that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); Atlas Concrete Pipe, Inc. v. Roger K. Au & Son Inc., 668 F.2nd 905, 908 (6th Cir. 1982); Chesapeake & Ohio Ry. v. City of Bridgemen, 669 F. Supp. 823, 824 (W. D. Mich. 1987). There is no material issue of fact unless, in viewing the evidence in favor of the non-moving party, a reasonable jury could return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Boddy v. Dean, 821 F. 2nd 346, 349 (6th Cir. 1987)."

In Anderson v. Liberty Lobby, quoted by the court above, the citation goes on to say "This requirement in turn is qualified by Rule 56 (f)'s provision that summary judgment be refused where the non-moving party has not had the opportunity to discover information that is essential to his position." Anderson, supra at 2511.

In the Answer to the Amended Complaint the Defendants/Petitioners denied that the assessments were properly made. In the Response to the Reply Brief filed by the Defendants/Petitioners they went into detail as to the defense being raised which was that the assessments had not been made pursuant to the provisions of the Internal Revenue Code.

The Defendants/Petitioners stated that the Tax Court decision was not an issue and was not being contested.

The Plaintiff/Respondent submitted, as an exhibit a document entitled "Certificate of Assessments and Payments" which they relied on to establish a prima facie case that the proper procedures had been followed in mak-

ing the assessments.

Defendants/Petitioners objected to the Exhibit and pointed out the following:

1. Discrepancies in various Certificates of Assessment and Payments involving the same people and the same period of time.

2. Subsequent Certificates showing "corrections" to make changes from the previous Certificates.

3. That a supposed "credit" for setting aside the sale of real estate was shown as being made over a year before the Court's Order setting aside the sale of real estate.

4. That a credit shown on a later Certificate as being made on February 19, 1987 did not show up on a Certificate certified as being true and correct to March 24, 1998.

5. That the Plaintiff/Respondent found it necessary to file an Amended Complaint to correct the amounts demanded from the Defendants/Petitioners.

As Defendants/Petitioners pointed out in their Brief these discrepancies alone should have been enough to destroy any prima facie case that might have been established by the admission of the Certificates as evidence.

The District Court did not consider this issue at all. Instead the District Court found:

"Without reaching the question of whether the tax court decision of October 25, 1984, has res judicata effect in the instant case the Court holds that the defendants are estopped from relitigating the amounts of the deficiencies for the tax years 1979 and 1980."

The amount of the deficiencies was never placed in issue. The procedures for making the assessments was placed in issue and the District Court ignored it.

The Court of Appeals for the Sixth Circuit stated:

"Because the defendants provided no evidence to show that the certificates of tax assessments were procedurally deficient or inaccurate, the district court did not err in

relying upon the certificates of assessment. See United States v. Walton, 909 F 2nd 915, 919 (6th Cir. 1990); United States v. Chilla, 871 F 2nd 1015, 1017-18 (11th Cir.) Cert. denied_____ U.S. _____ , 110 S. Ct. 498 (1989)"

Thus, the District Court did not rule on the correctness of the assessment procedures but only ruled that the Defendants/Petitioners were estopped from relitigating the amount of the deficiencies and the Court of Appeals found that the District Court did not err in relying on the Certificates of Assessment. Therefore, the only finding that has been made by either court is that the amounts of the deficiencies could not be contested. The District Court and the Court of Appeals both failed to realize that the amounts were not being contested and that the contest went to the correctness of the assessment procedures.

The procedures to be followed in making an assessment are set forth in 26 C.F.R. Sec. 301.6203-1

"The assessment shall be made by an assessment officer signing the summary record of the assessment. The summary record of the assessment, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record."

The failure to follow these prescribed procedures renders the assessment invalid.

"An assessment of a tax constitutes a determination by the IRS that taxes are actually owing in a certain amount. Treasury Regulations provide that assessments are made by assessment officer signing the summary record of assessment, which shows the identity of the tax-

payer, the character of the liability assessed. 26 C.F.R. 301.6203-1.

In order to be valid, the record of assessment must be made in accordance with the regulations, and must be signed by the appropriate officer. Essex v. Vinal, 499 F. 2nd 226, 230 (8th Cir. 1974), Cert. denied, 419 U.S. 1107 (1975)" Christensen v. U.S., 90-1 U.S.T.C. 50,219 (D.C.N.J. 1990)

The Defendants/Petitioners have raised the issue as whether or not a valid assessment has ever been made. The District Court and the Court of Appeals both ruled on the issue as to the amount of the assessment. Therefore, neither Court saw the importance of the discrepancies in the Certificates of Assessment.

Because the Defendant/Petitioners were contesting the validity of the assessments they attacked the admissibility of the Certificates of Assessment by showing the inaccuracies in various Certificates of Assessment involving the same people for the same years. If the Certificates of Assessment contained discrepancies or errors on their face it became important to have discovery to determine the actual procedure followed in preparing the Certificate of Assessment and the Assessment itself.

The information as to the procedure followed in preparing the Certificate of Assessment and in making the assessment was available to the Defendant/Petitioners only through the Plaintiff/Respondent. This information was readily available to the Plaintiff/Respondent in its own records.

In an attempt to determine the actual procedure used in makng the assessment the Defendants/Petitioners prepared and served Interrogatories on the Plaintiff/Respondent. The Plaintiff/Respondent answered by objecting to each and every one of the Interrogatories.

In response to the Plaintiff/Respondent's Motion for Summary Judgment the Defendants/Petitioners again reiterated the fact they were attacking the assessment procedures and not the amount of the assessment, pointed out the discrepancies in the Certificates of Assessment and advised the District Court that they intended to file a Motion to Reopen Discovery under Rule 56 (f).

The Defendants/Petitioners did file a Motion to Reopen Discovery.

The District Court did grant the Plaintiff/Respondent's Motion for Summary Judgment and then denied Defendants/Petitioners' Motion to Reopen Discovery because the Motion for Summary Judgment had already been granted.

Rule 56 (f) is a safe harbor intended to prevent premature Summary Judgements. The Rule is usually invoked when a party claims that it has had insufficient time for discovery or that the relevant facts were in the exclusive control of the opposing party. In the present case, the facts are in the possession of the United States and each and every discovery request was answered by objections.

The United States Court of Appeals for the Third Circuit has criticized the practice of granting Summary Judgments when pertinent discovery requests remain unanswered.

"We have said where the facts are in the possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." Sames v. Gable, 732 F. 2nd 49, (3rd Cir. 1984), quoting Ward v. United States, 471 F. 2nd 667, 670-1 (3rd Cir. 1973).

The Circuit Court of Appeals for the Ninth Circuit has ruled on this issue as follows:

"Clearly, a trial court's exercise of discretion will rarely be disturbed. This case, however, involves the fail-

ure of the trial court to exercise its discretion, not the abuse of it. Here, the court did not address the merits of Garrett's motion to compel production of the personnel records; it merely denied the motion as "moot" after having disposed of the case."

"First, although not formally denominated as a request under Rule 56 (f), under Ninth Circuit precedent Garrett's discovery motion was sufficient to raise the issue of whether he should be permitted additional discovery. Hancock, supra, 787 F. 2nd at 1306 n. 1 (pending motion to compel discovery was sufficient to raise Rile 56 (f) consideration); cf. Brae Transp, Inc. v. Coopers & Lybrand, 790 F. 2nd 1439, 1443 (9th Cir. 1986) (references in a memoranda and declarations to a need for discovery do not qualify as motions under Rule 56 (f)."

"In denying the discovery motion as "moot" after having first granted Defendant's summary judgment motion the district court failed to exercise its discretion with respect to the discovery motion. See Patty Precision v. Brown & Sharpe Mfg., Co., 742 F. 2nd 1260, 1264-5 (10th Cir. 1984) (trial court's failure to rule on opposing party's Rule 56 (f) affidavit prior to granting summary judgment against it reversed as a failure to exercise discretion) —" Garrett v. City and County of San Francisco, 818 F. 2nd 1515 (9th Cir. 1987).

In the Sixth Circuit the case was previously before them when a trial court failed to rule on a continuance pursuant to Rule 56 (f) before the court disposed of the entire case. Plaintiff's counsel conditionally moved for a continuance pursuant to Rule 56 (f) on the ground that the record was insufficient to decide the issues. The Circuit Court of Appeals for the Sixth Circuit held that the Plaintiff was entitled to a ruling on this properly tendered objection before the court disposed of the entire case. Yashon v. Gregory, 737 F. 2nd 547 (6th Cir. 1984).

In the present case the United States Court of Appeals for the Sixth Circuit ruled:

"For these reasons, although the district court should have ruled on the motion to reopen discovery before granting summary judgment against Grable, its delay in ruling until the issue was mooted does not require vacation of the judgment and remand of this case."

In the present case the United States Court of Appeals for the Sixth Circuit ruled that while the District Court should have ruled on the Motion to Reopen Discovery that it did not require vacation of the Judgment. Apparently, the Court of Appeals felt that the contest was to the amount of the assessment and that the discovery was not such that it would be of any value even if granted.

If the District Court and the Court of Appeals had realized that the contest was to the correctness of the assessment procedure and not to the amount of the assessment they would have realized that the discovery was of importance.

However, whether through a misunderstanding of the issue or for some other reason, the Sixth Circuit Court of Appeals has ruled that it is not reversible error to grant Summary Judgment without ruling on a 56 (f) Motion until after the Summary Judgment is granted.

The Third Circuit Court of Appeals ruled, under similar circumstance, that a continuance of a motion for Summary Judgment should be granted almost as a matter of course. Sames v. Gable, supra.

The Ninth Circuit Court of Appeals, similarly, has ruled that the failure to rule on a Rule 56 (f) Motion is a failure to exercise discretion rather than an abuse of discretion and was reversible error. Patty Precision v. Brown & Sharpe Mfg., Inc. Supra.

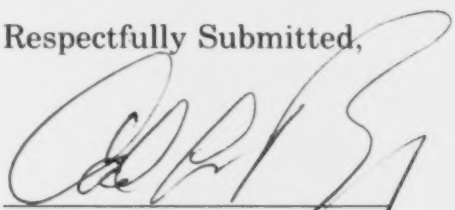
The Sixth Circuit Court of Appeals, in a previous case, has ruled that the non-moving party was entitled to a

ruling on a properly tendered objection before disposing of the entire case. Yashon v. Gregory, Supra.

The decision of the Sixth Circuit Court of Appeals, in the instant case, is in direct conflict with the decisions of the Third Circuit Court of Appeals and the Ninth Circuit Court of Appeals and of its own previously rendered opinion.

Wherefore, Petitioners request that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and determine which of the conflicting opinions should be the controlling law.

Respectfully Submitted,



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Dated: Lansing, Michigan
March 5, 1992

NUMBER

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1991

UNITED STATES OF AMERICA,
Plaintiff/Respondent

vs.

LESLIE GRABLE AND MARSHA K. BLANCHARD,
Defendants/Petitioners

APPENDIX

CARL L. REAGH
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IN UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, Case No. L88-257 CA

v.

LESLIE GRABLE AND MARSHA K. BLANCHARD HON. BENJAMIN F. GIBSON

Defendants.

UNITED STATES' MOTION FOR SUMMARY JUDGEMENT

The United States of America, by its attorney, John A. Smietanka, United States Attorney for Western District of Michigan, moves this Court, pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, for summary judgement. In support of its motion, the United States relies on the supporting memorandum of law, the Declaration and Certification of Robert B. Crowe and the Declaration of Daniel M. Houlf that are being filed concurrently with this motion.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	ANSWER TO AMENDED COMPLAINT
vs.	Case No. L88-257-CA
LESLIE GRABLE AND MARSHA L. BLANCHARD Defendants	HON. BENJAMIN F. GIBSON

NOW COMES the Defendants, Leslie Grable and Marsha K. Blanchard, by Carl L. Reagh, their attorney, and for answer to Plaintiff's Complaint say as follows:

1. The Defindants neither admit nor deny the allegations contained in Paragraph 1 of the Plaintiff's Complaint for the reason that they do not believe that there is any procedure for the collection of an "assessment".

2. The defendants, upon information and belief, deny the allegations contained in Paragraph 2 of the Plaintiff's Complaint for the reason that they do not believe the Plaintiff has complied with the provisions of Section 7401 of the Internal Revenue Code of 1986, Title 26 of the United States Code.

3. The Defendants deny the allegations contained in Paragraph 3 of the Plaintiff's Complaint for the reason that compliance with Section 7401 of the Internal Revenue Code of 1986, Title 26 of the United States Code is a prerequisite to jurisdiction.

4. The Defendants admit the allegations contained in Paragraph 4 of the Plaintiff's Complaint.

5. The Defendants admit the allegations contained in Paragraph 5 of the Plaintiff's Complaint.

6. The defendants admit the allegations contained in Paragraph 6 of the Plaintiff's Complaint.

7. The Defendants admit the allegations contained in Paragraph 7 of the Plaintiff's Complaint.

6. (number repeated) In Answer to Paragraph 6 (number repeated) of Plaintiff's Complaint the Defendants admit that they filed an Internal Revenue Form 1040 for the 1979 calendar year.

7. (number repeated) In Answer to Paragraph 7 (number repeated) of Plaintiff's Complaint the Defendants admit that they filed an Internal Revenue Form 1040 for the 1980 calendar year.

8. Defendants admit that a Tax Court decision was

entered as alleged in Pagagraph 8 of the Plaintiff's Complaint and allege that the exhibit attached to the Plaintiff's Complaint is immaterial to any issue in this case and is not admissible.

9. In Answer to Paragraph 9 of the Plaintiff's Complaint the Defendents admit that they filed an Internal Revenue Form 1040 for the calendar year of 1981 and allege that such form, as well as the additional form attached to the Complaint, are not admissible in evidence, are not material to any issue in this case and are a breach of the confidentiality of such forms as set forth in the Internal Revenue Code, Section 6103 (a).

10. In Answer to Paragraph 10 of the Plaintiff's Complaint the Defendants admit that they filed an Internal Revenue Form 1040X for the calendar year 1981 and allege that such form, as well as the additional form attached to the Complaint, are not admissible in evidence, are not material to any issue in this case and are a breach of the confidentiality of such forms as set forth in the Internal Revenue Code, Section 6103 (a).

11. The Defendants deny that assessments were properly made or that they were made on the dates alleged, deny that the "assessment" arose out of joint individual income tax returns and deny the amounts alleged as "unpaid balance".

12. The Defendants deny that the Plaintiffs made timely and proper notice and demand as required by statute.

AFFIRMATIVE DEFENSE
STATUTE OF LIMITATIONS

By way of further Answer to Plaintiff's Complaint the Defendants allege that if proper assessments were made

on the dates as alleged they were not made within the limitations period as set forth in Section 6501 (a) of the Internal Revenue Code.

PAYMENT

By way of further Answer to Plaintiff's Complaint the Defendants allege that for the year 1979 the amount as originally stated as paid and any additional amounts claimed were abated by audit. Further the amounts claimed for the year 1980 have been paid in full.

WHEREFORE, the Defendants ask that the Plaintiff's Complaint be dismissed with prejudice and with costs awarded to the Defendants.

CARL L. REAGH

Carl L. Reagh
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(517) 887-6240

Dated: Lansing, Michigan
March 27, 1989

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CASE NO. L:88-CV-257

v. HON. BENJAMIN F. GIBSON

LESLIE A. GRABLE and
MARSHA K. BLANCHARD

Defendants.

FINAL JUDGEMENT

With the Court having ruled on all issues in this matter, IT IS HEREBY ORDERED, DECREED AND ADJUDGED as follows:

1. That judgment shall enter in favor of the United States and against Leslie Grable and Marsha Blanchard, jointly and severally, in the amount of $12,489.43 for the tax year 1981, plus statutory additions from December 16, 1988.

2. That judgement shall enter in favor of the United States and against Leslie Grable in the amount of $102,600.47 for the 1979 tax year, and $2,735.76 for the tax year 1980, plus statutory additions on the entire

amount from December 16, 1988.

3. That judgment shall enter in favor of Marsha Blanchard and against the United States for the 1980 tax year.

IT IS SO ORDERED

DATED _____

_____
BENJAMIN F. GIBSON
United States
District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LESLIE GRABLE and
MARSHA K. BLANCHARD,
Defendants

MOTION TO REOPEN DISCOVERY
Case No. L88-257-CA

Hon. BENJAMIN F. GIBSON

NOW COMES the Defendants herein, by Carl L. Reagh, their attorney and make this Motion to Reopen Discovery for the reason that the issues in this case are extremely complex and all of the facts are within the knowledge and records of the Plaintiff's employees and agents.

This Motion is based on the files and records in this cause and the Declaration of Carl L. Reagh which is attached.

CARL L. REAGH

Carl L. Reagh
Attorney for Defendants
3615 Bayview – 86
Lansing, Michigan 48911

(517) 887-6240

Dated: Lansing, Michigan
May , 1989

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DECLARATION OF CARL L. REAGH

LESLIE GRABLE and MARSHA K. BLANCHARD,
Defendants

Case No. L88-257-CA

HON. BENJAMIN F. GIBSON

I, Carl L. Reagh, pursuant to the provisions of 28 U.S.C, Section 1746, declare that the following is true and correct:

1. I am a duly licensed attorney and have been retained to represent the Defendants in the above captioned cause.

2. The United States of America has filed a Complaint against the Defendants to collect unpaid income tax assessments.

3. Defendants haved denied that the assessments have been properly made pursuant to the provisions of the Internal Revenue Code and the Regulations made thereunder.

4. The knowledge as to the procedures followed by the Internal Revenue Service is exclusively in their records and within the knowledge of their employees and

agents.

5. That this Court issued an Order limiting the time to complete discovery to February 22, 1989.

6. The Defendants directed Interrogatories to the Plaintiff on February 21, 1989 and Plaintiff objected as they were not timely.

7. Plaintiff has now filed a Motion for Summary Judgement based on Certificates of Official Record claiming that these certificates create a prima facie case that the assessments were properly made.

8. The Defendants wish to take depositions of certain employees and agents of the Internal Revenue Service to establish the procedure used in making the alleged assessments.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Carl L. Reagh

Dated: Lansing, Michigan
May , 1989

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LESLIE GRABLE and
MARSHA K. BLANCHARD,
Defendants.

File No. L88-257 CA

Hon. Benjamin F. Gibson

OPINION

INTRODUCTION

The United States brings this action seeking judgment for assessments made against defendants Leslie Grable and Marsha K. Blanchard for the 1979, 1980, and 1981 tax years. Presently pending before the Court is the United States' motion for summary judgment.

FACTS

On August 18, 1980, defendants Leslie Grable and Marsha K. Blanchard filed a joint individual tax return for the 1979 tax year. On April 15, 1981, Grable and Blanchard filed a joint tax return for the 1980 tax year. On August 15, 1982, Grable and Blanchard filed a joint individual tax return for the 1981 tax year. Grable and Blanchard were married during 1979, 1980, and 1981, but have divorced since.

On September 27, 1982, the IRS made an assessment against the defendants for the 1981 tax year. The IRS subsequently determined that a deficiency existed with respect to the 1979 and 1980 tax returns, and on July 29, 1983, sent Grable and Blanchard a notice of the deficiency. Grable and Blanchard responded by filing a petition with the United States Tax Court. On October 24, 1983, Grable and Blanchard also filed an amended tax return for the 1981 tax year. The amended tax return reduced their stated gross income but still indicated a balance due to the United States of $5,713.00. The IRS accepted the amended return and accordingly abated part of the assessment of September 27, 1982, so that it conformed to the amended return.

On October 25, 1984, the United States Tax Court entered a one-sentence decision finding deficiencies due from the defendants for the 1979 and 1980 tax years in the amounts of $35,780.00 and $1,319.00, respectively. This decision was stipulated to by the IRS and the defendants. On November 28, 1984, the IRS made assessments against the defendants for the 1979 and 1980 tax years in the amounts of $35,780.00 and $1,319.00, respectively, pursuant to the Tax Court decision.

STANDARD OF REVIEW

Summary judgment is appropriate only where no genuine issue of fact remains to be decided so that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc., 668 F.2d 905, 908 (6th Cir. 1982); Chesapeake & Ohio Rv. v. City of Bridgeman, 669 F. Supp. 823, 824 (W. D. Mich. 1987). There is no materal issue of fact unless, in viewing the evidence in favor of the non-moving party. Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 249 (1986); Boddy v. Dean, 821 F.2d 346, 349 (6th Cir. 1987).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying those portions of the record which demonstrate the absence of a material issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Potters Medical Center v. City Hospital Association, 800 F.2d 568, 572 (6th Cir. 1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and come forward with specific facts showing that there is a material issue of fact on an issue which the non-moving party will bear the burden of proof at trial. Fed R. Civ. P. 56(e); Celotex, 477 U.S. at 322-24.

ANALYSIS

A. AMOUNTS DUE TO THE UNITED STATES

The United States has introduced into evidence a Certificate of Assessments and Payments for each of the tax years in dispute, and an affidavit by Robert B. Crowe, a Special Procedure Advisor to the IRS. Crowe's affidavit certifies that the balances due are $102,600.47 for the 1979 tax year, $2,735.76 for the 1980 tax year, and $12,489.43 for the 1981 tax year, reflecting interest and penalties through December 16, 1988. The Court finds that although both the Certificates of Assessments and Payments and the affidavit Certificates of Assessments and Payments and the affidavit are hearsay, they are admissible evidence as public records under Federal Rule of Evidence 803(8). Thus, the Court finds that the United States has met its initial burden of presenting evidence showing an absence of material facts in dispute as to the amounts due to the United States from the defendants.

The burden then passes to the defendants to set forth

specific facts showing that there is a genuine issue of fact for trial. Defendants have failed to set forth such specific facts and have relied only on general denials, which are insufficient.

Thus, the question before the Court is whether the United States is entitled to a judgment as a matter of law based on the facts before the Court. For the 1979 and 1980 tax years, the United States bases its claim on the deficiencies found in the decision by the United States Tax Court on October 25, 1984. Decisions of the United States Tax Court have res judicata and collateral estoppel effect. Commissioner v. Sunnen, 333 U.S. 591, 597-99 (1947); Kennedy v. Commissioner, Nos. 88-1254/1255, slip op. at 11 (6th Cir. June 5, 1989); Nathan v. Rowan, 651 F.2d 1223, 1226 (6th Cir. 1981). Without reaching the question of whether the Tax Court decision of October 25, 1984, has res judicata effect in the instant case, the Court holds that the defendants are estopped from relitigating the amounts of the deficiencies for the tax years 1979 and 1980.

For the 1981 tax year, the United States bases its claim on the defendants' own 1981 and amended 1981 tax returns. The defendants have not challenged the validity of these returns.

The defendants argue as an affirmative defense that the statute of limitations bars the assessments made by the IRS. The relevant statute, Title 26 United States Code Section 6501(a) of the Internal Revenue Code, provides that the assessments must be made within three years after the return was filed. Under Section 6501(a) the assessment for the 1981 tax year was timely.

The assessments for the 1979 and 1980 tax years also were timely. The defendants filed their 1979 tax return on August 18, 1980, the earlier of the two returns. Thus, Section 6501(a) provides for assessments until August 18,

1980, the earlier of the two returns. Thus, Section 6501(a) provides for assessments until August 18, 1983. However, Section 6503(a) of the Internal Revenue Code provides that if a notice of deficiency is sent, the period of limitations is suspended during the period for which the IRS is prohibited from making an assessment and for 60 days thereafter. In addition, in cases where the matter is placed on the docket of the United States Tax Court through a timely petition by the defendants, Section 6503(a) provides that the period of limitations is suspended until 60 days after the Tax Court decision becomes final. Since the assessments for the 1979 and 1980 tax years were made on November 28, 1984, within 60 days of the date on which the Tax Court decision was entered (October 24, 1984), the court finds that the assessments were timely and does not reach the question of when the Tax Court decision became final. Accordingly, defendants' statute of limitations defense does not bar the tax assessments.

B. JOINT AND SEVERAL LIABILITY

The second issue before the Court is whether the defendants are jointly and severally liable for the full amounts of the assessments made against them. Title 26 United States Code Section 6013(d)(3) of the Internal Revenue Code provides generally that taxpayers have joint and several liability for joint tax returns. However, Section 6013(d)(3) does have an exception in Section 6013(e), the so-called innocent spouse statute. Section 6013(e), as amended in 1984, provides in part:

> (e) Spouse relieved of liability in certain cases. —
>
> (1) In general. — Under regulations prescribed by the Secretary, if —
>
> (A) a joint return has been made under this section for the taxable year,

(B) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse,

(C) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such substantial understatement, and

(D) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement,

then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such substantial understatement.

26 U.S.C. § 6013(e) (1984).

The record before the Court indicates that during the tax years in dispute, Grable was occupied as a member of a manufacturing partnership, Grable & Sons Metal Products, and Blanchard was occupied as a housewife. The notice of deficiency of July 29, 1983, shows the deficiencies on the 1979 return relate mainly to unreported partnership income. This unreported partnership income was very substantial, approximately the same size as the reported adjusted gross income for that year.

The defendants have not alleged that any exception to Section 6013(d)(3) is applicable in this case. Furthermore, the defendants have the burden of proof as to each element of a claim to Section 6013(e). Purcell v. Commissioner, 826 F.2d 470, 473 (6th Cir. 1987); Shea v. Commissioner, 780 F.2d 561, 565 (6th Cir. 1986). The Court holds

that the record before it negates a claim by Grable to the exception offered by Section 6013(e). However, the Court finds that the United States has not met its initial burden with respect to defendant Marsha K. Blanchard. The United States has not presented evidence tending to negate a claim by Blanchard to the exception offered by Secton 6013(e), nor has the United States demonstrated an absence of support for such a claim in the record. The Court concludes that material issues of fact exist as to the extent to which Marsha K. Blanchard may be jointly and severally liable for the tax years in dispute.

CONCLUSION

For the reasons stated, the Court grants summary judgment as to the liability of defendant Leslie Grable for the tax years 1979, 1980, and 1981. The court denies summary judgment as to the liability of Marsha K. Blanchard and directs the parties to file additional briefs addressing the issue of the extent to which Marsha K. Blanchard is jointly and severally liable with Leslie Grable for the amounts due to the United States.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: June 30, 1989

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LESLIE GRABLE and
MARSHA K. BLANCHARD,
Defendants.

File No. L88-257 CA

Hon. Benjamin F. Gibson

ORDER

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 30th day of June, 1989.

PRESENT: HON. BENJAMIN F. GIBSON
DISTRICT JUDGE

In accordance with the Opinion dated June 30, 1989, IT IS HEREBY ORDERED that the motion for summary judgment of plaintiff United States is GRANTED IN PART and DENIED IN PART.

1. The Court GRANTS plaintiff's motion for summary judgment as to the liability of defendant Leslie Grable in the amounts of $102,600.47 for the tax year 1979, $2,735.76 for the tax year 1980, and $12,489.43 for the tax year 1981. In addition, Leslie

Grable is liable for statutory additions and interest which have accrued since December 16, 1988.

2. The Court DENIES plaintiff's motion for summary judgment as to the liability of defendant Marsha K. Blanchard.

IT IS FURTHER ORDERED THAT the parties shall have 30 days from the date of this order to file additional briefs on the issue of the extent of the joint and several liability of Marsha K. Blanchard with Leslie Grable for the amounts due to the United States.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LESLIE GRABLE and
MARSHA K. BLANCHARD,
Defendants

File No. L88-257-CA

Hon. Benjamin F. Gibson

MOTION TO SET ASIDE ORDER

Now comes the Defendant, Leslie Grable, by Carl L. Reagh, his attorney, and moves this Court to set aside the Order, dated June 30, 1989, granting Plaintiff's Motion for Summary Judgment as to Leslie Grable and denying the Motion as to Marsha K. Blanchard for the reason that the Court did not rule on Defendant's Motion to Re-Open Discovery and did not make any ruling as to the curcial issue raised in the pleadings and briefs as to the question of fact raised by the inconsistent "Certificates of Assessments and Payments" and whether or not the assessments were properly made.

This Motion is based on the files and records in this cause.

This Motion is brought under Federal Rules of Civil Procedure, Rule 59.

Carl L. Reagh
Attorney for Defendant,
Leslie Grable
3615 Bayview – 86
Lansing, Michigan 48911

(517) 887-6240

DATED: Lansing, MI
July 13, 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LESLIE GRABLE and
MARSHA K. BLANCHARD,
Defendants.

File No. L88-257 CA

Hon. Benjamin F. Gibson

ORDER

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 1st day of August, 1989.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

Presently pending before the Court is defendants' motion for reconsideration of the Order dated July 5, 1989 granting plaintiff's motion for summary judgment as to defendant Leslie Grable and denying it as to defendant Marsha K. Blanchard. The Court has reviewed defendants' motion, the arguments presented and the evidence relevant thereto. The Court remains convinced that the legal and factual basis of the entry of the Order in this matter was correct.

Accordingly, IT IS HEREBY ORDERED that defendants' motion for reconsideration is DENIED.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

LESLIE GRABLE and
MARSHA K. BLANCHARD,
Defendants.

File No. L88-257 CA

Hon. Benjamin F. Gibson

ORDER

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 4th day of August, 1989.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opiniondated August 4, 1989, IT IS HEREBY ORDERED that the motion for summary judgment of plaintiff United States with respect to defendant Marsha K. Blanchard is GRANTED IN PART and

DENIED IN PART.

1. The Court GRANTS plaintiff's motion for summary judgment as to the joint and several liability of defendant Marsha Blanchard with defendant Leslie Grable in the amount of $12,489.43 for the tax year 1981. In addition, Marsha Blanchard is jointly and severally liable with Leslie Grable for statutory additions and interest which have accrued since December 16, 1988.

2. The Court DENIES plaintiff's motion for summary judgment as to the liability of defendant Marsha K. Blanchard for the tax years 1979 and 1980.

IT IS SO ORDERED.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

IN UNITED STATES OF AMERICA,
Plaintiff,

v.

LESLIE GRABLE and
MARSHA K. BLANCHARD
Defendants.

Case No. L88-257 CA

HON. BENJAMIN F. GIBSON

MAGISTRATE HUGH W. BRENNEMAN, JR.

ORDER DENYING DEFENDANTS' MOTION TO REOPEN DISCOVERY

This matter having come before the Court on the Defendants' motion to reopen discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, and with the Court having considered the motion and all opposition thereto, and with the Court having fully decided Plaintiff's motion for summary judgment at the time of oral argument, it is hereby ORDERED that Defendants' motion to reopen discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedures is denied.

_____

HUGH W. BRENNEMAN, JR.
U.S. Magistrate

DATED: September 11, 1989

Approved as to form of the Order

_____

CARL L. REAGH
Counsel for the Defendants

Nos. 91-1152/1153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LESLIE GRABLE (91-1152);

and

MARSHA K. BLANCHARD (91-1153),

Defendants-Appellees.

FILED
OCT. 8, 1991
LEONARD GREEN,
Clerk

ORDER

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

BEFORE: MARTIN and MILBURN, Circuit Judges and ROSEN, District Judge.*

Leslie Grable and Marsha K. Blanchard ("the defendants"), pro se taxpayers, appeal the district court's final judgment for the United States in an action brought by the

* The Honorable Gerald E. Rosen, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

United States to reduce to judgment certain outstanding tax assessments. The appeals have been consolidated and referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The United States filed a complaint in September 1988, seeking judgment on unpaid tax assessments for the years ending 1979, 1980, and 1981. The defendants, now divorced, were married and filed joint income tax returns during those years. After the defendants' answer, the United States filed an amended complaint by stipulation in February 1989, to which were attached copies of the defendants' tax returns for the years at issue and a 1984 Tax Court judgment finding a deficiency for the amounts due for 1979 and 1980. At the time of the amended complaint, the amount due and owing for the three years totalled $117,825.66, plus additions from December 16, 1988, as allowed by law. Shortly thereafter, the United States moved for summary judgment and the defendants responded with a memorandum in opposition. After the submission of a reply brief and a further response, the defendants on June 16, 1989, filed a motion to reopen discovery.

In an opinion and order filed July 5, 1989, the district court granted summary judgment as to the liability of Grable, but denied summary judgment as to the liability of Blanchard. The parties were granted 30 days in which to file supplemental briefs on the issue of whether Blanchard was an innocent spouse within the meaning of 26 U.S.C. § 6013(e). Grable's motion to set aside the order was denied by order of August 2, 1989. On August 7, 1989, the district court granted summary judgment against her for the 1979 and 1980 tax years. A magistrate, who had conducted a hearing on the matter on

August 7, 1989, finally issued an order denying the defendants' motion to reopen discovery on September 12, 1989.

Following the defendant's premature appeals to this court, the district court issued a consent order which provided that the unpaid balance due for the 1979 tax year against Blanchard be abated. A United States motion for reconsideration or for entry of judgment against the United States motion for reconsideration or for entry of judgment against the United States then stipulated that, if the district court found that res judicata did not apply to the Tax Court decision, then Blanchard qualified as an innocent spouse for the 1980 tax year. On November 20, 1990, the district court denied the United States' motion for reconsideration and entered final judgment for the United States and against Grable for all three years, for the United States and against Blanchard for the 1981 tax year, and for Blanchard and against the United States for the 1979 and 1980 tax years. These appeals followed.

On appeal, the defendants raise six grounds for relief: (1) the district court did not litigate the issues of whether the Tax Court decision had been assessed as required by 26 U.S.C. § 6215 and whether a notice of assessment and demand for payment were issued, (2) the district court did not exercise its discretion by not ruling on the defendants' Rule 56(f) motion to reopen discovery, (3) the district court improperly found that secondary evidence was sufficient to determine that material issues of fact were not in dispute, (4) the district court lacked subject matter jurisdiction, (5) the district court lacked jurisdiction under 28 U.S.C. §§ 1340 and 1345, and 26 U.S.C. § 7402, and (6) jurisdiction may not be based upon 26 U.S.C. § 1. Although Grable and Blanchard are now proceeding pro se, due to their attorney's withdrawal, their brief was prepared by counsel. The United States has filed with this court a motion to impose sanctions against the defen-

dants' prior counsel for raising frivolous arguments on appeal.

Upon review, we affirm the district court's judgment because there is no genuine issue of material fact and the United States is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Issues 1 and 3 (as numbered above), which challenge the presumption of correctness accorded by the district court to the tax assessments prepared by the Internal Revenue Service, are meritless. Because the defendants provided no evidence to show that the certificates of tax assessment were procedurally deficient or inaccurate, the district court did not err in relying upon the certificates of assessment. *See United States v. Walton*, 909 F.2d 915, 919 (6th Cir. 1990); *United States v. Chila*, 871 F.2d 1015, 1017-18 (11th Cir.), *cert. denied*, ____ U.S. ____, 110 S. Ct. 498 (1989).

Moreover, contrary to the defendant's belief, notice and demand for payment are *not* prerequisites to the bringing of a civil suit to reduce a tax assessment to judgment; they are only required before an *administrative* action to collect the tax due. *See United States v. Berman*, 825 F.2d 1053, 1060 (6th Cir. 1987).

Issues 4 through 6 (as numbered above), which assert that the district court lacked jurisdiction over this action, are patently frivolous.

The sole nonfrivolous issue raised by the defendants on appeal challenges the district court's action in granting summary judgment while their motion to reopen discovery was pending. This court has held that summary judgment should not ordinarily be granted before discovery has been completed. *Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1535 (6th Cir. 1983). However, the district court, which has wide discretion over the scope of discovery,

ordered that discovery in this case be completed by February 22, 1991. There is no absolute right to additional time for discovery. *See Emmons v. McLaughlin*, 874 F.2d 351, 356 (6th Cir. 1989). Grable and Blanchard had ample time to respond to the United States' motion for summary judgment and, in fact, filed responses to both the motion and the government's reply brief over a month before they finally requested additional discovery on June 16, 1991. Moreover, the defendants' motion, in the absence of any articulated reason to believe that procedural irregularities existed, amounted to an impermissible "fishing expedition." *See Emmons*, 874 F.2d at 356-57. For these reasons, although the district court should have ruled on the motion to reopen discovery before granting summary judgment against Grable, its delay in ruling until the issue was mooted does not require vacation of the judgment and remand of this case.

Finally, although this court has exercised its authority to impose sanctions under Fed. R. Civ. P. 38 in frivolous tax appeals, *see, e.g., Schoffner v. Commissioner*, 812 F.2d 292, 294 (6th Cir. 1987) (per curiam); *Martin v. Commissioner*, 756 F.2d 38, 41 (6th Cir. 1985); we decline to do so in this case. Because the defendants' counsel did raise a nonfrivolous issue concerning their motion to reopen discovery, it cannot be said that this entire appeal was obviously without merit.

Accordingly, the district court's final judgment is hereby affirmed. Rule 9(b)(3), Rules of the Sixth Circuit. The United States' motion to impose sanctions is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk

Nos. 91-1152/53

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LESLIE GRABLE,
Defendant-Appellant
(91-1152),
Defendant (91-1153);

and

MARSHA K. BLANCHARD,
Defendant (91-1152),
Defendant-Appellant
(91-1153)

FILED
DEC. 9, 1991
Leonard Green,
Clerk

ORDER

BEFORE: MARTIN and MILBURN, Circuit Judges; and ROSEN,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active

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* Hon. Gerald E. Rosen sitting by designation from the Eastern District of Michigan

judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en blac, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk